

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 90

WCC No. 9708-7814

KATHY M. FITCH,

Petitioner,

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Respondent/Insurer for

J.C. PENNEY, INCORPORATED,

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 41-year-old stockroom merchandise handler for J.C. Penney was struck in the head by a box while helping unload a truck. She was subsequently diagnosed by various physicians as suffering from post-concussion syndrome, cervical strain, depression, temporalmandibular joint syndrome (TMJ), and carpal tunnel syndrome. Although she did not return to work at J.C. Penney, she worked for short periods post-injury as a housekeeper and receptionist. She claimed permanent total disability, claiming severe headaches, eye pain, neck pain, arm and right hand pain, and carpal tunnel syndrome.

Held: Claimant is not PTD. Although some physicians rendered diagnoses or gave opinions supporting claimant's allegations of disability, those diagnoses and opinions were based upon claimant's subjective reports of pain and disability, which the Court found incredible. A licensed psychologist's testimony that claimant suffered from dementia due to traumatic brain injury and a neurocognitive injury was discredited through cross-examination indicating he failed to properly administer or interpret tests and through the more persuasive testimony of a neuropsychologist with far more impressive credentials. Video surveillance taken on 14 days over a 24 day period showed claimant engaged in activities inconsistent with her subjective reports, leading panel physicians to testify her presentation during examination and during videotaped deposition was inconsistent with that portrayed on surveillance video. The Court's own review of video fortified its conclusion that claimant deliberately exaggerated her symptoms.

Topics:

Benefits: Permanent Total Benefits: Generally. A 41-year-old stockroom merchandise handler claimed PTD after being struck on the head by a box. Almost four years after the injury, she claimed severe headaches, eye pain, neck pain, arm and right hand pain, and carpal tunnel syndrome due to the accident. Although some physicians rendered diagnoses or gave opinions supporting claimant's allegations of disability, those diagnoses and opinions were based upon claimant's subjective reports of pain and disability, which the Court found incredible. Employer's motion to dismiss on ground that claimant was not an employee and faked her fall denied where not supported by "appropriate supporting documents and affidavits" as required by ARM 24.5.316(3).

Physicians: Psychological Evaluation. A licensed psychologist's testimony that claimant suffered from dementia due to traumatic brain injury and a neurocognitive injury was discredited through cross-examination indicating he failed to properly administer or interpret tests and through the more persuasive testimony of a neuropsychologist with far more impressive credentials.

Physicians: Psychologists. A licensed psychologist's testimony that claimant suffered from dementia due to traumatic brain injury and a neurocognitive injury was discredited through cross-examination indicating he failed to properly administer or interpret tests and through the more persuasive testimony of a neuropsychologist with far more impressive credentials.

Surveillance. Employer's motion to dismiss on ground that claimant was not an employee and faked her fall denied where not supported by "appropriate supporting documents and affidavits" as required by ARM 24.5.316(3).

¶1 The trial in this matter was held on February 20, 1998, in Bozeman, Montana, February 23, 1998, in Helena, Montana and April 17, 1998, in Missoula, Montana. Petitioner, Kathy M. Fitch (claimant), was present and represented by Mr. H. Charles Stahmer. Respondent, Liberty Mutual Fire Insurance Company (Liberty), was represented by Mr. Larry W. Jones.

¶2 Transcripts of the trial have been prepared and filed with the Court. Transcript citations in this decision are limited to quoted material and to facts critical to the Court's decision.

¶3 Exhibits: Exhibits 1 through 32, 34, 36, 47 through 51 and 53 through 56 were admitted. Exhibits 33, 35, 37 through 41, 43 and 44 were withdrawn. Exhibit 46 was admitted over the objection of Mr. Stahmer. Exhibit 52 was admitted as a demonstrative exhibit. Videotape surveillance of claimant was also admitted as Exhibits 42 and 45.

¶4 Witnesses and Depositions: Kathy Fitch, Lisa Waddell, Annie L. Castillo, M.D., James C. Deming, Ed.D., Karen Black, Allen R. Severson, Vickie Wyant, Michael Layman, M.D., Brenda Herbst, Tommy Fitch, Ethan B. Russo, M.D., Robert Velin, Ph.d., Mark Fullerton, Martin Cheatle, Ph.D., and Dana Headapohl, M.D., were sworn and testified. In addition the

Court received the depositions of Kathy Fitch (two depositions), Martin D. Cheattle, Ph.D., Kay Walstrom, Marion Bailey, Judy McCubbin, James C. Deming, Ed.D (two depositions), Ethan B. Russo, M.D., Herbert E. Prussack, M.D., Dana M. Headapohl, M.D., Karen Black, James L. Booth, D.D.S., Annie Castillo, M.D., John Campbell, M.D., Allen Severson, Lynne Sinnema, Leona Steenson, George Schramm, and Patricia A. LaHaie, M.D.

¶15 Issues Presented: As set forth in the Final Pre-Trial Order, the issues presented in this case are:

1. Whether Petitioner is permanently disabled and the amounts due, if any, and owing Petitioner.
2. Whether Petitioner is entitled to a 20% increase in benefits for Respondent/Insurer's alleged unreasonable refusal to pay benefits.
3. Whether Petitioner is entitled to medical benefits.
4. Whether Petitioner is entitled to an award of attorney fees and costs.

¶16 Having considered the final pre-trial order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

Injury and Benefits to Date

¶17 Claimant is presently 41 years old. She is married to Tommy Fitch.

¶18 Claimant was injured on June 20, 1994, while working for J.C. Penney, Incorporated, in Bozeman, Montana. She was helping unload a truck when she was struck in the head by a box. According to claimant, she saw spots and heard someone say, "You hit her with the box." (2/20/98 Tr. at 233.) The size and weight of the box which struck claimant is unknown.

¶19 At the time of her injury, claimant had worked for J.C. Penney for approximately two and a half years as a stockroom merchandise handler.

¶10 J.C. Penney was insured by Liberty, which accepted liability for the claim.

¶11 The parties agree that claimant has reached maximum healing and no further findings are required on that matter. (Uncontested Fact 3.)

¶12 Liberty paid claimant temporary total disability benefits from July 22, 1994 through September 23, 1994. (Uncontested Fact 5.) It also paid permanent partial disability benefits from March 31, 1997 through November 16, 1997. (*Id.*) Those benefits were paid under a reservation of rights (*id.*), however, the insurer is not seeking to recover its payments.

Post-Injury Work

¶13 Following her 1994 injury, claimant never returned to work for J.C. Penney. She did, however, work for short periods of time doing housekeeping type work. Between June and October 1997, she worked part time (two to four hours a day) for Ponderosa Homes. Over an eight-week period, she also worked for King Arthur Park cleaning a clubhouse and laundry area once a week, and also as a receptionist for a short time. Finally, she worked at Oakland Homes, doing part-time cleaning of manufactured homes for approximately two or three months. Her work for King Arthur Park and Oakland Homes was prior to June 1995.

Claimant's Case for Permanent Total Disability

¶14 On August 18, 1997, claimant filed her petition for hearing, asserting that she is unable to work and is permanently totally disabled.

¶15 Claimant testified, and she has told medical practitioners, employers, and friends, that she suffers from persistent, debilitating headaches, neck and back pain, loss of memory, and dizziness. She has also reported pain in both arms.

¶16 In addition to her own testimony that she is unable to work, claimant presented testimony and medical records of several physicians and a psychologist who have treated her. She also presented the opinions of a vocational consultant.

¶17 Claimant was initially treated for her injury by Dr. Curt G. Kurtz; however, the parties did not provide the Court with either Dr. Kurtz's records or his testimony.

¶18 Dr. Annie L. Castillo, an internist, assumed care of claimant on July 15, 1994, approximately three and a half weeks after her injury. Dr. Castillo examined claimant ten times between and including July 15, 1994 and June 1995. The doctor did not thereafter see claimant until February 18, 1998, two days prior to trial, at which time claimant saw Dr. Castillo to "reestablish care."⁽¹⁾ (Ex. 1C at 44.) During her 1994 treatment of claimant, Dr. Castillo diagnosed claimant as suffering from post-concussion syndrome, cervical strain, depression, and possible carpal tunnel syndrome (CTS). She referred claimant to Dr. Herbert E. Prussack, a neurologist,⁽²⁾ for further evaluation. (Castillo Trial Test. and Ex. 1C.)

¶19 Based on claimant's report of headaches, sleep disorder, fatigue, and other subjective symptoms, Dr. Castillo testified at trial that claimant has chronic post-concussion syndrome which renders her unable to work a regular eight hour, five day week. (2/20/98 Tr. at 66-67.) Dr. Castillo conceded that it is possible that claimant is falsifying her symptoms. (*Id.* at 66.) She agreed that her diagnoses of post-concussion syndrome and depression are based entirely on claimant's reports of her subjective symptoms of headaches, sleep disturbance, and fatigue. (*Id.* at 71.)

¶20 Dr. Prussack initially examined claimant on September 13, 1994, at which time the claimant complained of headaches, dizziness, and neck pain. Dr. Prussack saw claimant

approximately 15 times. Two days prior to his deposition, after not having seen claimant for almost a year (Ex. 1A at 3), claimant contacted Dr. Prussack to complain of a severe headache of two to three day duration "associated with a feeling of numbness on the left side of her body in her face and in her arm primarily."⁽³⁾ (Prussack Dep. at 6.)

¶21 During his treatment of claimant, Dr. Prussack diagnosed claimant as suffering from post-concussion syndrome, depression, cervical strain, CTS, and temporalmandibular joint syndrome (TMJ). All of Dr. Prussack's diagnoses, with the exception of cervical strain, were based on claimant's subjective reports. (Prussack Dep. at 13, 17, 18, 25, 27, 42, 46.) The post-concussion syndrome diagnosis was based on claimant's subjective reports of persistent headaches, dizziness, sleep disturbance, cognitive dysfunction, and depression. (*Id.* at 18, 42.) The CTS diagnosis was based on claimant's subjective complaints of tingling and numbness in her right hand and not on any objective medical tests. (*Id.* at 13, 20, 24, 26-27, 75). Dr. Prussack did not relate CTS to claimant's industrial accident or any other specific event. Similarly, his TMJ diagnosis was based entirely on claimant's subjective complaints of difficulty chewing and an inability to completely open her mouth; it was not verified by x-rays. (*Id.* at 13.) He did find muscle tightness in claimant's neck but there was no MRI or other objective evidence of cervical injury. (*Id.* at 31, 45.)

¶22 On June 10, 1995, claimant was involved in an automobile accident. She was seen at the emergency room of Bozeman Deaconess Hospital. (2/20/98 Tr. at 243-44.) Dr. Prussack provided follow-up care and testified that claimant suffered an increase in the severity and frequency of her headaches, but that the headaches were present and significant prior to the accident and that she was already suffering from chronic post-concussion syndrome. (Prussack Dep. at 33-34, 82.)

¶23 For purposes of this Decision, the Court has not considered whether the 1995 auto accident materially aggravated claimant's preexisting condition, thus relieving the insurer of liability for the 1994 industrial accident.⁽⁴⁾ The insurer has not tendered such a defense in its contentions in the final pre-trial order; in any event, this case is decided on unrelated grounds.

¶24 I have also not considered claimant's alleged CTS. The claimant alleges on page 2 of her petition for hearing that she "is also suffering from an occupational disease, carpal tunnel syndrome, which causes her pain and discomfort and further limits her physical ability." While Dr. Campbell, an orthopedic surgeon, provided testimony indicating that claimant may in fact suffer from CTS which prevents her from holding a job involving "repetitive motion work," (Campbell Dep. at 55), the Workers' Compensation Court does not have original jurisdiction involving disputed liability in occupational disease claims. See § 39-72-202, MCA. Claimant has presented no evidence that she filed an occupational disease claim for CTS or that the insurer has admitted liability for such a claim. She

presented no evidence that her alleged CTS was aggravated by her industrial accident. While presenting some evidence that CTS may have begun prior to her industrial accident, the severity of the condition is predicated on her reports of her symptoms, and the Court finds her reports incredible.

¶25 Dr. Prussack opined that as a result of her post-concussion syndrome and chronic pain, the claimant is unable to hold regular employment. (Prussack Dep. at 85-87; Ex. 1A at 2.)

¶26 Dr. Layman examined claimant in the emergency room following her June 1995 auto accident. (2/20/98 Tr. at 244.) It was the only time he saw her. (*Id.* at 250.) However, he also testified as an expert witness concerning the claimant's industrial accident.

¶27 Dr. Layman testified that however small and insubstantial was the box which hit claimant on June 20, 1994, it may have caused post-concussion syndrome. (*Id.* at 251-52.) He reviewed the medical records of Drs. Prussack and Booth, the records of the Missoula Medical Panel, and the depositions of Drs. Campbell, Castillo, and Booth. (*Id.* at 249-51.) He opined that claimant is suffering from post-concussion syndrome due to a combination of the 1994 industrial accident and the 1995 motor vehicle accident. (*Id.* at 257-58.)

¶28 As with other physicians, Dr. Layman's diagnosis and opinions were based on claimant's subjective complaints and are therefore dependent on the veracity of her complaints.

¶29 At Dr. Prussack's recommendation, claimant was examined by Dr. James C. Deming, who is a licensed psychologist. Dr. Deming administered a battery of psychological and psychoneurological tests. He testified that claimant suffers from "dementia due to traumatic brain injury" and a "neurocognitive injury." (2/20/98 Tr. at 93, 109, *see also* 85.) I give **no** weight to his testimony. As demonstrated by cross-examination and by the testimony of Dr. Robert A. Velin, a neuropsychologist with far more impressive professional credentials than Dr. Deming, Dr. Deming failed to properly administer and interpret the tests upon which he based his opinions. Dr. Velin disputed Dr. Deming's opinions and conclusions. I found Dr. Velin to be the more qualified and persuasive witness.

¶30 Karen Black (Black), a vocational consultant, testified on behalf of claimant. Based on restrictions she believed were placed on claimant by Drs. Prussack, Deming, and Campbell, a TMJ diagnosis, and her understanding that claimant suffers from migraine headaches, myofascial pain in the cervical, thoracic, and lumbar area, Black testified that claimant could not perform her old job at J.C. Penney, medium housekeeping type jobs such as she did for Ponderosa Homes and King Arthur Court, or sedentary receptionist duties, which she performed for a time for King Arthur Court. (2/20/98 Tr. at 184-89.) According to Black, claimant has no reasonable prospect of employment. (*Id.* at 190.)

¶131 The claimant, in her testimony, in her interaction with her friends, in her reports to physicians and Dr. Deming, and, to lesser extent, in her contacts with two employers portrayed herself as suffering frequent debilitating headaches, dizziness, neck pain, as having difficulty in chewing, an inability to completely open her mouth, difficulty with remembering, difficulty sleeping, tearfulness, right arm and hand pain, difficulty in concentrating, as being unable to use her arms in repetitive movements, as unable to carry out any sustained activity, and as able, with difficulty, to perform only minimal household chores at home.

¶132 At trial claimant sighed, laid her head on counsel table for much of the time, walked stiffly, and appeared to be in agony, at least until she testified. At a suppression hearing and on the first day of trial, the Court offered claimant a continuance because she presented herself as being in such great distress.

Malingering

¶133 Liberty presented persuasive, overwhelming evidence that claimant is malingering and that she has deliberately exaggerated her symptoms to her physicians, employers, friends, and the Court.

¶134 As a part of its evidence, Liberty presented surreptitious video surveillance films of the claimant and videotapes of claimant's depositions. The surveillance videotapes were taken over a twenty-four-day period between September 23, 1997 and October 16, 1998. Actual videotaping occurred on fourteen days.

¶135 The surveillance tapes were shown to one of claimant's friends, to three physicians who had previously examined her as a part of an independent medical examination, and to this Court. The friend (Brenda Herbert) expressed surprise at the extent of claimant's activities. The observations of the physicians following their viewing is detailed below. The video depositions of claimant were also reviewed by the Court and by Drs. Headapohl, Russo, and Cheadle.

¶136 Drs. Dana Headapohl, Ethan Russo, and Martin Cheadle participated in a Missoula Medical Panel evaluation of claimant in 1995 and again in 1997.⁽⁵⁾ Dr. Headapol is board certified in occupational medicine. Dr. Russo is a board certified neurologist. Martin Cheadle, Ph.D., is a psychologist who specializes in the treatment of pain.

¶137 The first panel examination was September 1995. After individually examining the claimant, the panel as a whole reported its conclusions on October 16, 1995, as follows:

What is the claimant's present diagnosis as it pertains to the accepted condition?

1) Cervical and upper back pain - myofascial pre-existing - temporarily aggravated by 6-30-95 [sic] injury.

- 2) Low back pain. NWR (Non work related)
- 3) Status post multiple head traumas. NWR
- 4) Possible post concussion [sic] syndrome secondary to non-work related 6-10-95 trauma.
- 5) Adjustment disorder.
- 6) Migraine headaches - pre-existing.
- 7) TMJ NWR

(Ex. 56 at 1.) It determined that there is no objective data supporting a CTS diagnosis. It found claimant to be at maximum medical improvement and found no (0%) impairment. (*Id.* at 3.) Finally, the panel found that claimant can perform light and sedentary work. (*Id.* at 2.)

¶138 The second panel examination took place in Missoula on October 15, 1997. Claimant traveled from Bozeman to Missoula that day, arriving at St. Patrick's Hospital at approximately 12:35 p.m. (Videotape for October 15, 1997). She entered the hospital at 1:08 p.m. for examinations by Drs. Headapohl, Russo, and Cheatle. The examinations were completed and claimant exited the hospital at 4:50 p.m. (*Id.*)

¶139 Unbeknownst to claimant and the panel doctors, a private investigator videotaped claimant's arrival at an entry into the hospital, her exiting the hospital, her activities thereafter until 8:08 p.m., when she checked into a motel, and her activities between 9:39 a.m. and 11:17 a.m. the next day (October 16, 1997).

¶140 Without knowledge of the video surveillance of claimant, Drs. Headapohl, Russo, and Cheatle submitted written reports to Liberty. As a panel they reported:

We have reinterviewed and examined Ms. Fitch on 10-15-97. Additionally, we reviewed the medical records provided. Our individual conclusions are unchanged.

(Ex. 47.)

¶141 In his individual report, Dr. Russo recorded that claimant was wearing a right wrist splint and complained of headaches, neck, back and arm pains, forgetfulness, lightheadedness, and decreased concentration. (Ex. 28 at 3.) He wrote:

I have no reason to change my initial assessments on this patient. It is apparent she has a somatization⁽⁶⁾ disorder and may well have more pressing difficulties with depression at this time. However, I can in no way, shape or form claim that her accident 6/30/94 [sic] has a substantial impact on the situation.

(*Id.*)

¶42 In her report of her October 15th examination of claimant, Dr. Headapohl provided a detailed narrative of claimant's complaints:

Present Problems:

Ms. Fitch describes her current problems as headaches, eye pain, neck pain, arm and right hand pain. Since the last evaluation she has been diagnosed with right carpal tunnel syndrome and she presents to the evaluation wearing a wrist splint.

She states that her pain is a constant ten on a scale of one out of ten, ten being excruciating pain. She states that she has severe headaches two to three times a week and that sometimes the intense symptoms will last for one to two days.

She states that virtually any activity increases her symptoms. She describes a typical day as putting a load of clothes into the washer and dryer, making the beds. She then sits or lies down for awhile. She dusts, does shopping. She sometimes drives herself. She tends to make a list when she is shopping so that she does not forget things and she cooks dinners. She states that her son helps her with chores.

She says that her forgetfulness and memory problems have increased since the last examination. "I keep forgetting really bad and I can't concentrate. That has gotten worse. What I don't understand, I have always worked, I love my job, I got hit and I haven't been the same since." When questioned further about her memory problem she states, "Like if somebody tells me something it will be two minutes later I can't remember. Sometimes it will be o.k. I remember bits and pieces of a conversation. It worries me. I don't know what is going on. I want to go back to before I got hit and start over again."

When asked about the signs and symptoms of depression she states that she thinks she is depressed and does endorse anhedonia.⁽⁷⁾ She is not on an antidepressant at this time. When asked about helplessness and hopelessness she states, "I never ask [sic] anyone to do anything until I got hurt. Now my son helps." She has gained 25 to 30 lb since the accident. Ms. Fitch states that she wakes up on and off throughout the night and has a great deal of difficulty sleeping because of discomfort, specifically headache and neck pain.

She describes chronic neck pain and stiffness and chronic low back pain. She describes an achy pain over the TMJ joints bilaterally, right greater than left.

She states that when she has severe headaches, two to three times a month, she sees black spots, loses her peripheral vision and then is nauseated and vomits.

Ms. Fitch continued to be off work since our last evaluation. Current medication includes 1.25 mg of Premarin which was started up recently, Darvocet-N 100 tid (she has taken five to six since last week when the medication was re-prescribed by

Dr. Prussack). She states that she had been taking "a whole gob of Ibuprofen" but quit because of some gastrointestinal distress.

(Ex. 27 at 3-4.) Claimant further reported that "her symptoms continued to worsen even after leaving Penney's [sic] and worsened considerably over the past few months." (*Id.* at 5.) Dr. Headapohl performed a physical examination of claimant and reviewed claimant's medical records. Based on the history provided by claimant, the physical examination, and the review of medical records, Dr. Headapohl provided her impressions as follows:

1. Myofascial pain of cervical, thoracic and lumbar back - preexisting.
2. SP multiple head traumas.
3. Migraine headaches - preexisting.
4. TMJ syndrome - preexisting.
5. Neuro-cognitive deficits documented on Jim Deming EdD testing - unlikely relationship to 6-30-94 injury.
6. Electrodiagnostic evidence of bilateral CTS, right greater than left unrelated to accident.

(*Id.* at 17.) Finally, she observed, "The biomechanic and mechanism of the injury are not consistent with her current reported symptoms." (*Id.*)

¶43 Dr. Cheatle did not provide a separate report of his October 15, 1997 examination of claimant but signed the panel report found at Exhibit 47.

¶44 At trial, each of the doctors testified that the manner in which the claimant presented herself during their October 15, 1997 examinations was strikingly different than what they observed of claimant on the videotapes.

¶45 After reviewing the videotapes, Dr. Russo made the following observation in a note of November 17, 1997:

This is an updated report after reviewing approximately 10 hours of videotaped material on Kathy Fitch, including video surveillance and depositions. My general impression of this is that the surveillance shows the patient doing many activities such as thoroughly washing and cleaning a truck for over 2 hours, including many activities the patient had indicated she was incapable of performing. It would bolster my opinion that the patient has no substantial medical sequelae of the events of 6/30/94 and likely could be employed if she were motivated to do so. It also supports the distinct medical impression that the patient has been exaggerating her complaints.

(Ex. 28 at 1, emphasis added.)

¶46 Dr. Russo testified that claimant presented herself on October 15th in a similar manner to what is shown in her videotaped deposition of October 7, 1997. (2/23/98 Tr. at 121.) In testifying, Dr. Russo noted the following discrepancies between what he observed of claimant during his October 15th examination and what he observed on the videotapes:

- During the examination the claimant clinched her jaw, keeping her teeth close together, whereas during a videotaped evening meal on October 15th she did not exhibit any jaw or mouth problems. (2/23/98 Tr. at 111,122.) He characterized her chewing at dinner as "inconsistent" with her presentation during the examination. (*Id.* at 123.)
- In viewing the videotape of claimant washing and cleaning a pickup on September 23, 1997, he testified that her demonstrated ability to "compulsively clean her truck for two hours, without an apparent break, without evidence of distress, using her right arm freely . . . appearing quite normal and industrious," (*Id.* at 124), was at odds with her representations concerning her physical abilities. (*Id.*)
- In cross-examination, Dr. Russo testified:

Q. (By Mr. Stahmer) And in that ten hours, the only real physical activity you saw her doing was basically wiping that truck down?

A. On the contrary, I saw samples of her eating, walking, et cetera, that were, again, inconsistent with the presentation that occurred clinically.

(*Id.* at 130-31.)

¶47 Dr. Headapohl reviewed the video surveillance and made copious notes of her review. (Ex. 27 at 19-36, 38-55.) The review altered her medical opinions.

¶48 As did Dr. Russo, Dr. Headapohl testified that claimant's presentation on October 15th was similar to what she observed of claimant in her videotaped deposition of October 7th. (4/17/98 Tr. at 107.)

¶49 Dr. Headapohl vividly contrasted claimant's behavior during her October 15th examination with what she observed on the video surveillance tapes. Viewing the October 15th videotape made of claimant after the IME was completed, Dr. Headapohl testified:

A. All of the sections of the videotape showed her consistently in action, and, that is, she had no apparent problem with movement of the right upper extremity particularly. She had no apparent problem with posture. Both of those things were entirely inconsistent with the presentation during the examination when she walked virtually without swinging her arm at all, holding it in a protective, almost glass-like pattern.

Q. When you say "glass-like," could you expand?

A. Yes. It's a - there are certain individuals who do have extreme pain of the upper extremity and they hold their limbs in a protection that would suggest that the limbs are made of glass.

Q. I'll activate the video again. It says 5:22 p.m. October 15th, 1997. And there is a woman in white and then behind her, do you recognize that adult woman?

A. Yes.

Q. Who is that?

A. Ms. Fitch.

Q. Would you watch what she does here. What does she do?

A. She opens the door with her right hand.

Q. Is that the extremity she was guarding during the evaluation?

A. Yes.

(*Id.* at 110-11.) Dr. Headapohl further testified that videotapes of claimant eating on October 15th and October 2nd were inconsistent with claimant's presentation of her TMJ limitations during the October 15th examination. (*Id.* at 111-15.)

¶150 Dr. Headapohl viewed the September 23rd videotape of claimant washing and cleaning the pickup. She characterized claimant's physical activities on that date as "[e]xtremely inconsistent, 180 degrees inconsistent" from her presentation during the 1995 and 1997 examinations. (*Id.* at 116.)

¶151 Based on a comparison of the videotapes with the history taken and observations made during her 1995 and 1997 examinations of claimant, Dr. Headapohl concluded that claimant is malingering. She testified:

Q. In this case, did you form an opinion - after you reviewed the videotapes, did you form an opinion as to whether Kathy Fitch was and had been malingering?

A. I felt, based on the videotapes, that she was consciously misrepresenting herself to us, which is consistent with the definition of malingering.

Q. That opinion, is that based on a more probable than not basis?

A. Yes.

Q. In the videotapes, the surveillance tapes, not the deposition tapes, did you find any behavior consistent with her reported history of long-standing physical problems?

A. No.

(*Id.* at 119.)

¶52 Dr. Cheatle was more charitable than Dr. Headapohl in that he was more reluctant to judge the reasons for the discrepancies he observed regarding claimant's behavior. In a November 20, 1997 letter he wrote:

I had an opportunity to view all of the tapes provided by you regarding Kathy Fitch. The first tape is an initial video deposition which took place on October 7, 1997. Of note is that the patient on multiple occasions consistently stated that she was unable to sustain significant activity utilizing her right upper extremity for more than ten to fifteen minutes. The patient noted that if she persisted in this type of activity that she would experience a significant increase in arm pain and headache. Also during this deposition the [sic] restricted the use of her right upper extremity, looked somewhat saddened, requested taking breaks and at times put her head down on the table apparently due to her exhaustion and/or pain.

Subsequent video tapes consisted of surveillance of Ms. Fitch. One striking bit of video was Ms. Fitch aggressively cleaning and vacuuming her F350 Ford. This occurred over two hours without any breaks taken or any hint of pain behavior, or restriction of her right upper extremity. Other surveillance scenes show Ms. Fitch walking swinging both arms again with no suggestion of pain behavior. What I gather from these tapes and based on history provided to me by Ms. Fitch with respect to her limitations, is that her behavior captured on the video surveillance is significantly different than what she proclaims as her limitations.

This alters my assessment of this case in that I would add two additional diagnoses to consider, that being malingering and a compensation neuroses. Apparently we will discuss my opinions further during the scheduled deposition.

(Ex. 32 at 3-4.)

¶53 As did Drs. Headapohl and Russo, Dr. Cheatle characterized the manner in which claimant presented herself during her October 7th deposition as inconsistent with the manner in which she presented herself during his October 15th examination of her.

¶54 Reviewing the September 23rd truck washing videotape, Dr. Cheatle found claimant's activities at odds with her behavior during his 1995 and 1997 examinations of her. In discussing his observations of claimant during his examinations of her, Dr. Cheatle testified that claimant demonstrated "very slow motion, a fair amount of guarding behavior" (4/17/98 Tr. at 21.) Comparing his examinations with the videotape, he said:

The car washing showed a completely different presentation. Very vigorous use of both upper extremities, fluid motion, fairly high level of energy for a sustained amount of time, no overt evidence of pain behavior, guarding or breaks.

(*Id.*) He characterized the differences in what he observed in his examinations and the video as "significant." (*Id.* at 21-22.)

¶55 The Court has viewed the videotapes of the insurer's surveillance of claimant. I have compared what I observed on the tapes with what I observed of claimant during trial and during a one day suppression hearing held October 30, 1997. I cannot reconcile the physical abilities demonstrated by claimant on the surveillance tapes with her behavior in Court. Additionally, when subjected to cross-examination and asked to demonstrate the industrial accident, claimant moved fluidly and unhesitatingly in her demonstration, which was in sharp contrast to her stiff, guarded movements when not testifying.

¶56 On October 22, 1997, claimant's attorney filed a motion for protective order requesting, among other things, that any video surveillance be suppressed. Because of the serious allegations set forth in the motion,⁽⁸⁾ the Court scheduled a hearing on the motion for October 30, 1997. (order setting hearing (October 24, 1997).) On October 24, 1997, during a second deposition, counsel for Liberty showed the claimant the October 7th video surveillance, including claimant's entry into and exit from Labor Contractor Services.

¶57 Lisa Waddell, who is employed by L.C. Staffing Service (formally Labor Contractors Services) testified that on October 7, 1997, claimant came into the payroll service office, brought cashiers checks and discussed business without any apparent physical problems. (2/20/98 Tr. at 19-20.) On October 28th, **two days prior to the October 30th hearing**, claimant telephoned Lisa Waddell and told her that "she often got headaches and when dealing with numbers and et cetera, sometimes got confused and that sometimes it just was hard to go through with working through the numbers, et cetera." (*Id.* at 20.) That was the first time Waddell had been informed of claimant's alleged problems.

¶58 The first day of trial in this matter was held on February 20, 1998. Claimant made two significant contacts during the preceding two days.

¶59 On February 18, 1998, she had an appointment with and was seen by Dr. Castillo. (*Id.* at 60.) She complained of headaches and depression. (*Id.*) The last time Dr. Castillo had seen claimant was in June of 1995, more than two and a half years previous. (*Id.* at 61.) Dr. Castillo noted the purpose of the visit: "She is here to reestablish medical care." (Ex. 1C at 44, emphasis added.)

¶60 The February 18, 1998 visit might be explained by the fact that Dr. Castillo was scheduled to testify at trial and needed an update on claimant's condition. If an isolated incident, the Court would assume as much. However, claimant's return to Dr. Castillo was not an isolated event and it occurred after Dr. Castillo's deposition had been taken and a

mere two days prior to trial. Moreover, Dr. Castillo's note indicates that claimant's purpose in the visit was to "reestablish medical care." (*Id.*)

¶61 On February 19, 1998, the day prior to the commencement of trial, claimant was seen by Dr. Deming, a licensed psychologist, on an emergency visit. His testimony describes the circumstances of the contact:

A. I - I evaluated Kathy Fitch, I think, on three occasions, I met with her to discuss results, and I met with her yesterday in crisis.

THE COURT: So that's five times?

THE WITNESS: I - Five or six.

THE COURT: You met with her yesterday to do what?

THE WITNESS: She called my office and set up an appointment to discuss, for lack of a better descriptor, the catastrophic reaction she's having to all this, which included some suicidal ideation.

....

Q. And what would that be? What would be your opinion as to what the cause of her problems currently are?

A. I evaluated Ms. Fitch a number of months ago and I determined clinically that she was very fragile, that she was capable of decompensating into psychosis, as I reported. And when I met with her yesterday, I saw evidence of that decompensation. I believe she does not have the coping ability to deal with the events of her life since this accident.

....

Q. Yesterday, this meeting with Kathy Fitch, how long was that?

A. It was an hour.

Q. What time of day?

A. 8:00 in the morning.

Q. Did the topic of this trial come up?

A. No.

Q. What did she identify as the precursor, the cause, or the events that led to what you've characterized as the crisis?

A. Kathy Fitch believes that she is losing everything. She is making a desperate plea for help to deal with the stressors of her life. She's not sleeping. Her concentration was very, very impaired. Her judgment was impaired. I believe that medical intervention is very necessary at this time on her behalf.

Q. When did she make the appointment? Was it that morning or the day before?

A. I don't know. I believe she called my office the day before, and then - maybe two days before. I - I didn't return her call. I didn't know what the purpose of it was. The next day she - she showed up at my office and made an appointment for the following morning. I think that's how it happened.

Q. Do you know if she drove herself both days?

A. I don't have any idea. I believe - No, I think I do have an idea. I don't - I believe that she was accompanied by an - I think somebody else drove her. I believe that somebody else drove her at least on the second occasion. I don't believe I know about the first occasion that she ended up in my office.

Q. So the day before trial she comes in and presents to you in what you believe is a crisis situation?

A. I believe that she was in crisis, yes.

Q. The day before trial?

A. Yes.

THE COURT: When was the last time you'd previously seen her?

THE WITNESS: During the evaluation, Your Honor.

THE COURT: Which was?

THE WITNESS: I believe that would be the end of September, October.

THE COURT: And you haven't been treating her in the interim?

THE WITNESS: No, sir. Although I did recommend to her physicians that treatment be initiated, and I was distressed when she presented that she had not received treatment for her sleep disorder and depression.

(2/20/98 Tr. at 172-76.)

¶162 After not seeing Dr. Campbell for more than a year, the day prior to her October 7, 1997 deposition the claimant returned to the doctor complaining of a "worsening" of her symptoms and "having a fair amount of night pain and problems." (Ex. 1B at 1.) Dr. Campbell prescribed a splint. Prior to her deposition on October 7th, claimant or her

counsel informed counsel for Liberty that she usually wore a splint. (October 7, 1997 Fitch Dep. at 6.)

¶163 On the afternoon of November 17, 1997, claimant called Dr. Prussack and complained of a severe headache of two to three day duration "associated with a feeling of numbness on the left side of her body in her face and in her arm primarily." (Prussack Dep. at 6.) Dr. Prussack viewed her symptoms with alarm and told her to go to the emergency room. (*Id.*) Concerned for claimant's welfare, Dr. Prussack contacted the emergency room later that afternoon to alert it that claimant would be coming into the ER. (*Id.* at 7.) Later that evening, he attempted to call claimant at home but obtained her answering machine. (*Id.*) He followed up by calling the ER again, only to discover that claimant had not arrived. (*Id.*) On the morning of the next day, November 18th, he contacted claimant's attorney for help in contacting claimant. (*Id.*) At lunchtime, he learned that claimant had just shown up at the ER. (*Id.* at 8.) After lunch he stopped by the ER, was told that claimant was suffering from migraine and had responded to an injection. (*Id.*) He stopped to see claimant and reassured her. (*Id.*)

¶164 Dr. Prussack was deposed on November 20, 1997, three days after claimant's emergency call to him. His deposition was noticed on November 10, 1997, (notice of deposition (November 10, 1997)), prior to the events described in the previous paragraph.

¶165 Another of claimant's contacts with Dr. Prussack provides further evidence of a deliberate attempt to influence testimony in conjunction with this proceeding. Prior to the filing of this case, Dr. Prussack last saw claimant on December 10, 1996. (Ex. 1A at 3.) On August 8, 1997, ten days prior to her filing her petition for hearing with this Court, claimant called Dr. Prussack. His office note concerning the call states:

Kathy called stating that she would like medication for her headache. She states it is like headaches that she has had in the past but it has been going on for two weeks. It is at the back of her head at the base of her skull and upper part of her neck. I indicated to her it has been eight months since I have seen her and I would prefer to see and exam her prior to ordering medication. She stated she would call back and make an appointment.

(Ex. 1A at 1.) Claimant did not call back for an appointment; her next contact with Dr. Prussack was November 17, 1997, as described previously.

¶166 My own review of the video surveillance and claimant's video depositions fortifies my conclusion that claimant has and is deliberately exaggerating her symptoms.

¶167 The September 23rd videotape shows claimant washing and cleaning a pickup truck over an approximately two-hour period. She does so with no obvious physical restrictions or pain. Her work on the truck is inconsistent with her reported limitations.

¶168 Claimant has attempted to explain away the September 23rd videotape by testifying that she has good and bad days. That sort of evidence is difficult to evaluate. However, it must be viewed in the context of what the Court observed of claimant at trial and the physical limitations the claimant has asserted in her testimony and in her reports to her physicians and friends. In that context, it is difficult if not impossible for the Court to square what the Court observed on the videotape with claimant's presentation at trial, which the Court can only characterize as histrionic, and with what she reported and portrayed to others.

¶169 Even more telling is the claimant's husband's explanation for her cleaning the pickup. According to claimant's husband, Tommy Fitch (Tommy), claimant was forced to wash the truck because they had to travel to a funeral for Tommy's grandmother (10/30/97 Tr. at 16), and Tommy was too ill to take the truck to the car wash. He said he was so sick that when he and claimant left the next day for the funeral she had to drive. (2/23/98 Tr. at 62-63, 66.) According to Tommy, he was "crazy sick" at the time claimant washed and cleaned the family pickup. (*Id.* at 62-63.)

¶170 Tommy operates a business moving and setting up mobile homes. To move mobile homes, he uses a "toter" truck which is designed for that purpose. According to Tommy, he is the only person who drives the toter. (*Id.* at 67.) When asked if anyone else has driven his toter he replied, "The fall is the only time I've ever had anybody else drive my truck." (*Id.* at 67.) He testified that the singular occasion was in November and that the driver was a trusted employee. (*Id.* at 67-68.)

¶171 Tommy was then shown a videotape taken on September 23rd showing the toter being driven from his and claimant's residence. (*Id.* at 70.) Tommy denied being the driver, then suggested that his son may have been the driver even though he was not supposed to drive it:

Q. (By Mr. Jones) This is September 23rd, 12:25 p.m., that blue truck in the rear is the toter?

A. Yes.

Q. That's your residence?

A. Yes.

Q. That's your truck?

A. Yes, it is.

Q. 1:36 p.m., is that your toter?

A. Yes, sir.

Q. And September 23?

A. Yes, sir.

Q. The day before you went to the funeral?

A. It must be.

Q. And that's the day that you say you didn't do any work?

A. I was sick the day before we left, yes.

Q. So sick that you stayed in the house all day?

A. I don't remember if I came out or not, but I know I was sick.

Q. That's the time of year when you did have not [sic] another employee who would have been able to drive that truck, right, according to your testimony?

A. My son drives it a little. He's not supposed to.

Q. So there is someone else now that you say -

A. Well, he's not supposed to.

Q. Because of your poor recollection about what you just testified, you really couldn't remember all the way back and tell us your son actually drove that truck that day, can you?

A. I can't.

(*Id.* at 70-71.) Tommy's testimony was incredible. I do not believe that claimant washed the truck because he was sick or that he was in fact sick.

Resolution

¶72 I find that claimant has and is deliberately exaggerating her symptoms. I am unpersuaded she is unable to return to her job at J.C. Penney or other regular employment. In short, I find her reports of her symptoms wholly incredible.

CONCLUSIONS OF LAW

¶73 Claimant was injured on June 20, 1994, and her entitlement to benefits is governed by the 1993 version of the WCA. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶74 Claimant alleges that she is permanently totally disabled. Permanent total disability benefits are governed by section 39-71-702, MCA (1993), which provides in relevant part:

39-71-702. Compensation for permanent total disability. (1) If a worker is no longer temporarily totally disabled and is permanently totally disabled, as defined in 39-71-116, the worker is eligible for permanent total disability benefits.

¶75 Claimant bears the burden of proving that she is due PPD benefits. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¶76 The Workers' Compensation Act defines permanent total disability as follows:

(19) "Permanent total disability" means a condition resulting from injury as defined in this chapter, after a worker reaches maximum medical healing, in which a worker does not have a reasonable prospect of physically performing regular employment. Regular employment means work on a recurring basis performed for remuneration in a trade, business, profession, or other occupation in this state. Lack of immediate job openings is not a factor to be considered in determining if a worker is permanently totally disabled.

§ 39-71-116, MCA (1993).

¶77 Claimant has failed to persuade the Court that she is permanently totally disabled. To the contrary, the evidence presented at trial persuades the Court that the claimant has deliberately and falsely exaggerated her headaches, her neck and back pain, her memory loss, her hand and arm pain, her depression, and virtually every other complaint she has reported to her physicians and the Court.

JUDGMENT

¶78 1. Claimant is not entitled to permanent total disability benefits.

¶79 2. Claimant is not entitled to attorney fees, a penalty or costs.

¶80 3. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶81 4. Any party to this dispute may have 20 days in which to request a rehearing from these findings of fact, conclusions of law and judgment.

DATED in Helena, Montana, this 17th day of December, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. H. Charles Stahmer
Mr. Larry W. Jones
Submitted: April 17, 1998

1. As discussed later in this Decision, the Court finds claimant's return to Dr. Castillo after a two and a half year lapse more than coincidental.
2. Dr. Prussack is not board certified in neurology but is board eligible. (Prussack Dep. at 5.)
3. As discussed later in this Decision, the Court finds claimant's call to Dr. Prussack just prior to his deposition more than coincidental. It was part of a pattern indicating her deliberate attempt to influence the medical opinions given in this case.
4. To relieve the insurer of liability the insurer would have to prove that the claimant had reached maximum medical improvement prior to the accident **and** that the accident materially aggravated claimant's preexisting conditions.
5. Two additional doctors served on the 1995 panel, Dr. Timothy Browne, an orthopaedist, and Dr. Eric Hughson, an internist.
6. "Somatization" means "conversion of an emotional, mental, or psychosocial problem to a physical complaint." On-Line Medical Dictionary, www.medscape.com (Merriam-Webster, 1997).
7. Anhedonia is the "total loss of feeling of pleasure in acts that normally give pleasure." Dorland's Illustrated Medical Dictionary, 27th ed.
8. After hearing the Court found the allegations unfounded. (court memorandum concerning motion for protective order (December 30, 1997).)